

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:

DIABETES AMERICA, INC.,

Debtor.

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§

CASE NO. 10-41521-H1-11

**DEBTOR'S EXPEDITED MOTION TO APPROVE
(I) SALE PROCEDURE, FORM OF ASSET PURCHASE AGREEMENT
AND FORM OF NOTICE; AND (II) BID PROTECTIONS**

A HEARING WILL BE CONDUCTED ON THIS MATTER ON AUGUST 18, 2011 AT 3:00 P.M. IN COURTROOM 404, 515 RUSK AVENUE, HOUSTON, TEXAS. IF YOU OBJECT TO THE RELIEF REQUESTED, YOU MUST RESPOND IN WRITING SPECIFICALLY ANSWERING EACH PARAGRAPH OF THIS PLEADING. UNLESS OTHERWISE DIRECTED BY THE COURT, YOU MUST FILE YOUR RESPONSE WITH THE CLERK OF THE BANKRUPTCY COURT PRIOR TO AUGUST 18, 2011. YOU MUST SERVE A COPY OF YOUR RESPONSE ON THE PERSON WHO SENT YOU THE NOTICE; OTHERWISE, THE COURT MAY TREAT THE PLEADING AS UNOPPOSED AND GRANT THE RELIEF REQUESTED.

**To the Honorable Marvin Isgur,
Chief United States Bankruptcy Judge:**

Diabetes America, Inc. (the "Debtor") files this Motion to Approve (i) Sale Procedure, Form of Asset Purchase Agreement and Form of Notice; and (ii) Bid Protections.

Nature of the Motion

1. The Debtor has negotiated a term sheet providing for the sale of substantially all of its operating assets to EDG Partners Fund II, L.P. (together with its affiliates and assigns, "EDG") free and clear of all liens, claims, interests and encumbrances under 11 U.S.C. §§ 1129(b)(2)(A)(iii) and 1123(a)(5) for a cash purchase price of \$4,750,000 plus the assumption of up to \$925,000 in certain post-petition accrued liabilities. The agreement between the Debtor and EDG will form the foundation of the Debtor's chapter 11 plan of liquidation. Under the contemplated plan, an auction will be conducted in connection with confirmation. In order to

induce EDG to serve as the “stalking horse” bidder in the sale process, the Debtor has agreed to certain bid procedures and protections. The Debtor seeks court approval of these procedures and bid protections as set forth below.

Expedited Consideration

2. The Debtor requests expedited consideration of this motion. The exclusive period for the Debtor to file a chapter 11 plan expires on August 19, 2011. The proposed sale procedure and bid protections are integral to the liquidating plan that will be proposed by the Debtor. Moreover, if a sale is not closed in the next 90 days, the Debtor may not have sufficient resources to fund its ongoing operations and any going concern value will be lost. Under the circumstances, the Debtor believes that expedited consideration of the proposed sale procedure and bid protections is warranted. No party is prejudiced as all interested purchasers may participate in the sale process.

Background

3. On December 21, 2010, the Debtor filed this chapter 11 case. The Debtor continues to operate its business and manage its properties as a debtor-in-possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code.

4. On July 14, 2011, the Debtor filed its application to employ WoodRock & Co. (“WoodRock”) as its investment banker in this case [Docket No. 233].

5. Starting in early July, 2011, WoodRock and the Debtor began assembling marketing and due diligence materials to initiate a process designed to evaluate all options to (i) sell all or part of the Debtor’s operating assets; (ii) raise new equity capital; (iii) obtain new debt financing; or (iv) achieve a combination of the foregoing. In the process, the Debtor and WoodRock immediately began contacting interested parties regarding their interest in the

Debtor. These efforts resulted in several indications of interest. WoodRock fully explored each indication of interest that was received. The Debtor ultimately received term sheets from two interested parties. Each term sheet went through multiple iterations and price increases. After extensive negotiations with both interested parties, the Debtor selected EDG as its stalking horse bidder. A copy of the EDG Term Sheet (the “Term Sheet”) is attached as **Exhibit 1**.

6. The Debtor and EDG are in the process of negotiating the terms of a definitive asset purchase agreement (the “Asset Purchase Agreement”), which will be filed with the Court prior to the hearing on this motion. The Term Sheet and Asset Purchase Agreement will be subject to higher and better offers. Under the Term Sheet, the Debtor has agreed to seek approval of a sale procedure, form of Asset Purchase Agreement, form of notice and certain bid protections as more fully set forth below.

7. The Debtor also intends to file its chapter 11 plan in the coming weeks. The Debtor’s chapter 11 plan will incorporate the sale procedure and bid protections set forth herein. Under the plan, the Debtor intends to sell its operating assets to the winning bidder under §§ 1129(b)(2)(A)(iii) and 1123(a)(5) of the Bankruptcy Code. The Debtor requests that the Court consider approval of the sale to the winning bidder at the hearing on the confirmation of the Debtor’s chapter 11 plan (the “Confirmation Hearing”).

The Sale Procedure, Form of Asset Purchase Agreement and Form of Notice

8. The Debtor seeks approval of the following:

Asset Purchase Agreement. The Debtor and EDG are in the process of preparing an Asset Purchase Agreement. The Debtor will file the Asset Purchase Agreement before the hearing on this motion. The Debtor seeks approval of the form of Asset Purchase Agreement.

Notice of Confirmation Hearing. Within five (5) business days following the entry of an order approving this motion, the Debtor will serve by first class mail a notice of the proposed sale containing the date of the Confirmation Hearing to: (i) all potential purchasers previously identified or solicited by the Debtor and/or WoodRock during this bankruptcy case; (ii) all other potentially interested parties identified by the Debtor and/or WoodRock (collectively, with the parties identified in (i) above, the “Potential Purchasers”); (iii) the Office of the United States Trustee; (iv) counsel for EDG; (v) counsel for the Official Committee of Unsecured Creditors (the “Committee”), (vi) all parties who are known to possess or assert a lien, claim, encumbrance or interest in or upon any of the Purchased Assets (as defined in the Term Sheet); (vii) all applicable United States, state and local regulatory or taxing authorities, recording offices or any governmental entity which have a reasonably known interest in the relief requested under the Debtor’s chapter 11 plan; and (viii) all parties on the most current master service list filed in this case.

Qualified Bidders. Only Qualified Bidders may participate in the bidding process. To become a Qualified Bidder, a potential bidder must on or before 5:00 p.m. Central Time on September 15, 2011 (i) execute and deliver to WoodRock a confidentiality agreement prepared by the Debtor and approved by EDG, (ii) deposit with counsel for the Debtor the sum of \$500,000 (each, the “Alternative Buyer’s Deposit”) which deposit shall be nonrefundable unless such Qualified Bidder is not the highest and best offer as determined by the Court; (iii) submit to the Debtor an unqualified and binding cash bid of at least \$5,250,000, plus the assumption of up to \$925,000 in post-petition accrued non-professional liabilities along with an executed written agreement substantially in the form of the Asset Purchase Agreement as determined by the Debtor (“Qualified Bids”); and (iv) provide financial and other information to WoodRock, the Debtor and the Committee that allow them to make a reasonable determination as to such bidder’s ability to consummate a sale as contemplated herein. Credit bids shall not be considered Qualified Bids. EDG is and shall be deemed to be a Qualified Bidder and a party in interest for all purposes. If no other Qualified Bidders are identified, the Asset Purchase Agreement between the Debtor and EDG shall be deemed the Highest and Best Bid (as defined below). No letter of intent or other written proposal submitted to the Debtor prior to the filing of this motion by any party other than EDG shall constitute or be considered a Qualified Bid for purposes of these sale procedures. The Debtor, in consultation with the Committee, shall be responsible for conducting the bid and sale process.

Notice of Qualified Bidders. On or before 5:00 p.m. Central Time on September 20, 2011, the Debtor shall file a notice with the Court identifying all Qualified Bidders and attaching copies of all bids that were timely received. All information received by the Debtor shall be shared with counsel for the Committee and counsel for EDG. The Debtor shall serve a copy of the notice and the corresponding bids on all Qualified Bidders by (a) facsimile or electronic mail or (b) overnight delivery.

Auction. If one or more timely Qualified Bids are received, an open auction for the Purchased Assets will be conducted on September 28, 2011, commencing at 10:00 a.m. Central Time at the offices of Porter Hedges LLP, 1000 Main Street, 36th Floor, Houston, Texas. Only Qualified Bidders may participate in the auction. All Qualified Bidders, or their authorized representatives, must be physically present or present via teleconference at the auction. At the commencement of the auction, the Debtor shall announce the bidding order, which shall be based on: (i) the amount of the Qualified Bidder's bid (from low to high); and (ii) if Qualified Bids are identical, the time the Qualified Bids were delivered to the Debtor (the first such received identical bid going first in the auction); *provided, however*, that EDG shall bid last in any bidding round in which it participates. Minimum overbid increments at the auction shall be in the amount of not less than \$150,000.

Selection of the Highest and Best Bid. At the conclusion of the auction, the Debtor will announce the highest and best Qualified Bid (the "Highest and Best Bid") and the next highest and best Qualified Bid (the "Back-Up Bid"). The Debtor will seek approval of the Highest and Best Bid at the Confirmation Hearing. If for any reason, the Qualified Bidder submitting the Highest and Best Bid fails to timely consummate the purchase of the Purchased Assets, the Debtor may seek to consummate a sale based on the Back-Up Bid without further approval by the Court. The Back-Up Bid and the obligation of the party submitting such bid to consummate the purchase of the Purchased Assets shall remain open and in full force until the close of a sale of the Purchased Assets to the party making the Highest and Best Bid or the party making the Back-Up Bid.

Return of Deposits. Within two business days after the conclusion of the auction described above, the Debtor shall return by check the full amount of the Alternative Buyer's Deposit submitted by each party that is not selected as submitting the Highest and Best Bid or the Back-Up Bid. If the sale of the Purchased Assets is consummated with the party submitting the Highest and Best Bid, the Alternative Buyer's Deposit of the party that is declared the Back-Up Bid shall be returned by check transfer within two business days after the closing of the sale to the party submitting the Highest and Best Bid. In the event that closing does not occur by the date specified by the Back-Up Bidder in its bid, it shall be entitled (at its option) to return of its deposit, in which case it shall no longer have the status of Back-Up Bidder. If EDG's bid is neither the Highest and Best Bid or the Back-Up Bid, then its Deposit (defined below) shall be returned within twenty-four (24) hours of the conclusion of the auction.

9. The foregoing sale procedure provides an appropriate framework to ensure that the Debtor's goal of obtaining the maximum value for the Purchased Assets is realized. The proposed process is transparent and represents a fair balance of the competing issues present in this case.

Requested Expense Reimbursement

10. In connection with the Term Sheet and Asset Purchase Agreement, the Debtor seeks approval of a capped expense reimbursement (the "Expense Reimbursement"). Specifically, if (i) the Asset Purchase Agreement is terminated as a result of a breach by the Debtor, or (ii) the Debtor accepts a bid from an alternative bidder, or (iii) a plan of liquidation approving the sale to EDG as provided for in the Term Sheet and the Asset Purchase Agreement is not confirmed on or before October 19, 2011, then the Debtor shall pay to EDG reimbursement of all expenses incurred by EDG in connection with the transaction, up to a maximum of \$350,000 (the "Expense Reimbursement"). The Debtor's obligation to pay the Expense Reimbursement shall constitute an administrative expense of the kind specified in § 503(b)(1) of the Bankruptcy Code, shall constitute a carve out from any and all encumbrances on the Purchased Assets (which carve out shall transfer to any and all encumbrances on the proceeds thereof at the closing) and shall not be subject to secured claims of any party, and, notwithstanding any other order of the Bankruptcy Court. The \$500,000 deposit made by EDG (the "Deposit") shall be held in an interest bearing segregated escrow account with Debtor's counsel and shall not be intermingled with, or deemed to be, an asset of the estate. The Deposit shall not be subject to any adverse claims or liens against the Debtor. The Debtor shall return the Deposit (if not previously returned in accordance with the provisions in Paragraph 8 concerning Return of Deposits) and pay the Expense Reimbursement to EDG upon the earliest to occur of: (i) the closing of an alternative transaction; (ii) the termination of the Asset Purchase Agreement except as a result of a breach by EDG; and (iii) the failure to timely confirm a Plan in accordance with the deadlines established in the Term Sheet and the Asset Purchase Agreement.

11. The Debtor believes that the Expense Reimbursement is appropriate under the circumstances as a cost of ensuring that the Debtor's bankruptcy estate maximizes value for the

Purchased Assets, while also providing the Debtor with the opportunity to continue its marketing efforts. The Debtor believes that the amount of the cap on the Expense Reimbursement is imminently reasonable for a transaction of the type and size contemplated, and in light of the attendant risks present in this case.

12. The determination of whether a stalking horse fee/expense arrangement should be allowed is based on whether the fees and expenses are necessary to preserve the value of the estate. *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527, 534 (3d Cir. 1999). Courts have evaluated such arrangements under the business judgment rule standard. *Cottle v. Storer Communications, Inc.*, 849 F.2d 570 (11th Cir. 1988); *CRTF Corp. v. Federated Dep't Stores*, 683 F.Supp. 422 (S.D.N.Y. 1988); *In re Integrated Res., Inc.*, 147 B.R. 650, 657 (S.D.N.Y. 1992), *appeal dismissed by* 3 F.3d 49 (2d Cir. 1993); *see also In re Twenver, Inc.*, 149 B.R. 954 (Bankr. D. Colo. 1992). The considerations that underlie a debtor's business judgment to pay a break-up fee or expense reimbursement are relevant to the Court's determination of the request. *Id.*

13. It is well-established that "[a] bankruptcy court should uphold a break-up fee which was not tainted by self-dealing and was the product of arm's-length negotiations." *In re Integrated Res., Inc.*, 147 B.R. at 658. In the instant case, the proposed Expense Reimbursement and bid protections have been the product of good faith, arm's-length negotiations between the Debtor and EDG. The proposed Expense Reimbursement is based on actual expenses incurred and is within the spectrum of "break-up fees" approved by bankruptcy courts in chapter 11 cases throughout the country. *See e.g., In re Enron Corp.*, Case No. 01-16034 (AJG) (Bankr. S.D.N.Y., April 8, 2004) (court approved break-up fee equal to 5% of the purchase price); *In re TransCom USA Management Co., L.P.*, Case No. 01-35158 (KKB) (Bankr. S.D. Tex., February

12, 2002) (court approved a break-up fee of more than 3.6% of the purchase price for the assets); *In re Ameriserve*, Case No. 00-0358 (PJW) (Bankr. D. Del., September 27, 2000) (court approved a break-up fee of 3.64% or \$4,000,000 in connection with \$110,000,000 sale).

Accordingly, the Debtor requests that the Court (i) approve the motion as set forth above; and (ii) grant the Debtor other just relief.

Dated: August 11, 2011.

Respectfully submitted,

Porter Hedges LLP

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was duly served by United States first class mail to all parties listed on the attached Service List and by electronic transmission to all registered ECF users appearing in the case on August 11, 2011.

/s/ Joshua W. Wolfshohl
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